SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1912

No. 150

FRANK LUKE AND JOHN LUKE, APPELLANTS,

vs.

JESSE HOYT SMITH.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

BRIEF ON BEHALF OF APPELLEE.

STATEMENT OF CASE.

This is an action commenced by the above named appellee against William J. Rainey and against the above named appellants, to foreclose a lien upon six hundred (600) acres of land in the vicinity of Phoenix, Arizona. The action was commenced in the District Court of the Third Judicial District of the Territory of Arizona, in and for Maricopa County, on or about the 18th day of July, 1903. An amended complaint was filed in the action on December 31st, 1903 (Transcript of Record, page 9). The appellants demurred to this complaint; the demurrer was sustained by the District Court of the Territory of Arizona and on appeal to the Supreme Court of Arizona the judgment of the District Court was affirmed. The plaintiff and present appellee appealed from the judgment of the Supreme Court of Arizona to this Court and its decision was reversed by this Court on March 16, 1908 (Smith vs. Rainey, 209 U. S. 53). The action was subsequently tried in the District Court of the Third Judicial District of the Territory of Arizona, in and for the County of Maricopa, and a judgment was entered in favor of the appellee and against said William J. Rainey, for the sum of Twenty-eight

Thousand Two Hundred Twenty-four Dollars and Two Cents ($28,224.02), together with interest and costs. The court also adjudged the lien of the appellee to be prior to that of the appellants and a judgment of foreclosure in the usual form was entered against said Rainey and the appellants (Transcript of Record, pages 17 and 18).

The appellant appealed from that judgment to the Supreme Court of Arizona, which Court affirmed the judgment of the lower court (Transcript of Record, pages 31 to 37, inclusive).

From that judgment this appeal was taken.

The statement of facts required by the Act of Congress of April 7, 1874, 18 Stat. 27, c. 80, will be found on pages 47 to 53, inclusive, Transcript of Record. We shall not reprint in full the statement of facts in this brief, but desire to call the attention of the Court to several mis-statements regarding the facts contained in the appellants' brief.

On page 4 of the appellants' brief we find the statement that on the 20th day of September, 1901, the Lukes and Rainey entered into a contract, through which Rainey became obligated to the Lukes to pay them some Twenty-five Hundred Dollars ($2,500). We find no such statement in the certificate of facts contained in the printed record.

On page 7 of appellants' brief, we find the following statement:

> "On the 28th day of November, 1903, the demurrer "of the defendants Luke to the amended complaint was "sustained by the District Court, and that ruling was "subsequently approved by the Supreme Court of the "Territory *and by the Supreme Court of the United "States.*"

The fact is that the ruling was expressly reversed by this Court. (Smith vs. Rainey, 203 U. S. 56.)

The facts found and certified to this Court by the Supreme Court of Arizona, stated briefly, are as follows:

First. That on March 20th, 1897, the appellee and Rainey purchased the premises described in the complaint, for the sum of Eighteen Thousand Dollars ($18,000), every dollar of which was paid by the appellee, and that in and by the deed of conveyance, under which said purchase was made, an undivided two-thirds (2/3) of the premises were granted to the appellee and an undivided one-third (1/3) thereof to Rainey; and that the deed of conveyance was duly recorded in the Recorder's office of Maricopa County, Arizona.

Second. That in the month of April, 1897, an agreement in writing was entered into, by and between the appellee and

Rainey, which agreement recited the purchase of the premises in question by the appellee and Rainey; the payment of the entire purchase price by the appellee and the purpose of the appellee and Rainey to improve, plat and sell the premises at a profit.

It was provided in said written agreement that the improvement of said tract should be commenced not later than January 1st, 1898.

That the improvements should consist of surveying and platting the entire tract into lots, opening up and grading of all streets, the planting of suitable shade, ornamental and fruit trees, and such other improvements as might be agreed upon between the parties.

That appellee, in addition to the purchase price of Eighteen Thousand Dollars ($18,000), should advance all sums necessary for the improvement of said premises and also all such as might be required for the running and incidental expenses in the undertaking, including taxes, irrigation charges, marketing said lots and the reasonable and necessary expenses of Rainey from Cleveland, Ohio, to Phoenix, Arizona, and return, and his living expenses when in Arizona engaged in business relating to said property.

That all money advanced by the appellee in said purchase as well as all that might be thereafter advanced, should be considered and treated as a loan or loans by him and should be paid to him as rapidly as possible from the receipts from the sale or sales or other income of said property, until the sum should be fully paid, with interest at six per cent (6%) per annum, and before any division of profits should be made.

That if, at the date of five years from the making of said agreement, the appellee should not have been fully repaid, said loans, with interest out of the proceeds or income of said premises, said Rainey agreed that he would on demand thereafter pay to said appellee the one-third of all such loans then unpaid, including interest thereon.

That Rainey should have the general management of said tract, including the improvements thereof, provided that no contract or other obligations on account of said property, exceeding in the aggregate the sum of Five Thousand Dollars ($5,000) should be entered into without the previous written consent of said appellee, and no contract for the sale of any such lots should be made except at prices and on terms to be agreed upon between the appellee and said Rainey, and that Rainey should from time to time give to said appellee true accounts of all transactions relating to the business and full information in regard to all matters which should come into

his hands or knowledge respecting such business, and should give due regard to his wishes and directions respecting same.

That said Rainey should keep proper books of account relating to said business, which should be at all times open to inspection of appellee and render appellee monthly statements showing all contracts made and all disbursements and receipts, and showing all the assets and liabilities of the partnership.

That Rainey, in said agreement, agreed to accept the general management of said tract of land without other consideration or remuneration, excepting only his one-third (1/3) share in the net profits of such business as provided in said agreement.

That after the repayment to said appellee of the purchase price and all advances, the appellee should be entitled to two-thirds (2/3) of the net profits and said Rainey to one-third (1/3) thereof. The losses, if any, to be shared in the same ratio.

That the agreement was entered into for the purpose of stating explicitly the terms of co-partnership, on which the appellee and said Rainey joined in the purchase, improvement and sale of said tract and that each would fulfill in good faith, to the best of his ability, the articles contained in said agreement.

Third. That on November 28th, 1898, said Rainey executed and delivered to one Anthony G. Hubbard, a mortgage upon an undivided one-third interest in said premises to secure the payment of Three Thousand Dollars ($3,000), which mortgage was duly recorded in the office of the County Recorder of Maricopa County, Arizona, and was thereafter released and discharged of record by the mortgagee.

Fourth. That at various times between March 20th, 1897, and May 23rd, 1903, appellee advanced, in pursuance of said contract, the further sum of Thirty-two Thousand Four Hundred Seventy-three Dollars and Thirty-five Cents ($32,473.35), and that one-third (1/3) part of such payments and advances, so made by appellee, with interest from the date of the several payments and advances at the rate of six per cent (6%) per annum amounts to Twenty-one Thousand Seven Hundred Seventy-two Dollars and Seventeen Cents ($21,772.17), which sum was due to appellee from Rainey under the terms of said contract on May 23, 1903. That since May 23rd, 1903, and prior to November 28th, 1903, said appellee advanced the further sum of One Thousand Eighty-five Dollars ($1,085); that one-third (1/3) thereof, together with interest thereon, from the 28th day of November, 1903, was on the trial of this action due from said Rainey to said appellee, and that the total amount due from said Rainey to said appellee for principal

and interest, under the terms of said contract, is the sum of Twenty-eight Thousand Two Hundred Twenty-four Dollars and Two Cents ($28,224.02); and that no part thereof has been paid.

Fifth. That appellee has complied with, and fulfilled all the terms and conditions of said contract on his part to be performed; that said Rainey has failed and neglected to perform and carry out the terms and conditions of said contract to be performed on his part.

Sixth. That on June 11th, 1902, the record title to an undivided one-third (1/3) interest in the premises in question was in said Rainey; than on that date the appellant commenced an action in the District Court of Maricopa County, Arizona, against said Rainey to recover the sum of Twenty-five Hundred Dollars ($2,500) with interest thereon from April 1, 1902, and in said action levied an attachment upon Rainey's interest in the premises in question.

That on June 11th, 1903, the appellants recovered a judgment in said action against said Rainey for the sum of Twenty-five Hundred Dollars ($2,500) with interest from April 1, 1902, together with the costs of the action, and which judgment foreclosed the lien of the attachment levied upon said premises in said action.

That on August 6th, 1903, an order of sale was issued directed to the Sheriff of Maricopa County, Arizona, commanding him to seize and sell, as under execution, the premises described in complaint to satisfy said judgment; that said Sheriff did seize the premises and property and after due notice sold said premises to the appellants for the full amount of their judgment with costs.

That thereafter, and on June 20th, 1904, no redemption of said premises from said sale had been made, and on that date the Sheriff executed, acknowledged and delivered to the appellants a Sheriff's Deed for said premises.

Seventh. That the contract between the appellee and Rainey attached to this second amended complaint as Exhibit "A" was never filed for record in the Recorder's office of Maricopa County, Arizona, and that neither of said appellants had any knowledge or notice of the existence of said contract at any time prior to the filing of the plaintiff's second amended complaint herein, saving and excepting such notice, actual or constructive, as was imparted to them by the pleadings in this cause, or which the law imputed to them from such pleadings.

The appellants have assigned five errors upon which they rely for a reversal of the judgment in the case at bar, namely:

I.

The Court erred in holding W. J. Rainey to be a trustee for Smith, of an undivided one-third of the premises in controversy.

II.

The Court erred in holding Smith's alleged partner's lien to be a lien on Rainey's one-third interest in the premises in controversy, and in holding such lien to be superior to the Luke's attachment lien thereon.

III.

The Court erred in holding that the appellants had notice of Smith's partner's lien prior to their purchase of the premises in controversy at the sheriff's sale, and that such notice rendered such purchase subject to such alleged partner's lien.

IV.

The Court erred in holding that paragraph 2703 Rev. Stat. Ariz. 1901, is not applicable to the facts in this case.

V.

The Court erred in affirming the decree of the trial court in directing the sale of Rainey's one-third interest in the property in controversy in satisfaction of the claim of Smith against the alleged partnership of Smith and Rainey.

We will consider these assignments of error in the order named.

ARGUMENT.

FIRST.

The Court did not err in holding W. J. Rainey to be a Trustee for Smith of an undivided one-third (1/3) *of the premises in controversy.*

That the premises in question were partnership property is *res adjudicata* in the case at bar. (Smith vs. Rainey, 209 U. S. 53.)

On behalf of appellee, we insist:

That by reason of the partnership relation, the legal title to the entire tract was held by Smith and Rainey in trust for the benefit of the partnership and the satisfac-

tion of firm creditors, and all claims between the partners before any portion of the interest of either partner could be reached by his individual creditors.

"Where the conveyances are to both partners, they "are in law tenants in common, presumptively equal "owners; but in equity, whether the title be in them "jointly or in one of them, the property is assets, "amenable to creditors, and the surplus is to be dis- "posed of between them on settlement of the partner- "ship account. It is, therefore, a general principle, "that each partner has a lien on the partnership prop- "erty, not only for the amount of his interest, but for "moneys advanced beyond his contribution to the cap- "ital, to the uses of the co-partnership. And this "lien attaches on real estate held for partnership pur- "poses as well as on the joint personal estate."

Whitney vs. Cotton, 53 Miss. 689, 691-692.

"And it appears to us, that considering the nature "of a partnership, and the mutual confidence in each "other, which that relation implies, it is not putting "a forced construction upon their act and intent, to "hold that when property is purchased in the name "of the partners, out of partnership funds and for "partnership use, though by force of the common law "they take the legal estate as tenants in common, yet "that each is under a conscientious obligation to hold "that legal estate, until the purposes for which it was "so purchased are accomplished, and to appropriate "it to those purposes, by first applying it to the pay- "ment of the partnership debts, for which both his "partner and he himself are liable, and until he has "come to a just account with his partner. Each has "an equitable interest in that portion of the legal es- "tate held by the other, until the debts, obligatory on "both, are paid, and his own share of the outlay for "partnership stock is restored to him. This mutual "equity of the parties is greatly strengthened by the "consideration, that the partners may have contrib- "uted to the capital stock in unequal proportions, or "indeed that one may have advanced the whole. Take "the case of a capitalist, who is willing to put in "money, but wishes to take no active concern in the "conduct of business, and a man who has skill, ca- "pacity, integrity and industry to make him a most "useful active partner, but without property, and they "form a partnership. Suppose real estate, necessary

"to the carrying on of the business of the partnership "should be purchased out of capital stock, and on "partnership account, and a deed taken to them as "partners, without any special provisions. Credit is "obtained for the firm, as well on the real estate as "the other property of the firm. What are the true "equitable rights of the partners, as resulting from "their presumed intentions, in such real estate? Is "not the share of each to stand pledged to the other, "and has not each an equitable lien on the estate, re- "quiring that it shall be held and appropriated, first "to pay the joint debts, then to repay the partner who "advanced the capital, before it shall be applied to "the separate use of either of the partners?"

Dyer vs. Clark, 46 Mass. 562, 577-578.

"The lien of a partner, for a balance (on the part- "nership accounts) is not an incident of the legal title "to the effects; but results from the partnership, and "is not affected by the mortgages of either partner on "his share."

Hodges vs. Holeman, 1 Dana 50 (Ky.)

"Partners in lands have an equity against each "other, for the purpose of producing equality among "themselves; and this equity fastens itself, and is a "lien, upon their respective interests in the partner- "ship lands, of which neither can be deprived by the "other, or a creditor of his, or purchaser from him "with notice."

Williams vs. Love, 2 Head 80.

"The law now seems to be well settled, that an exe- "cution may be levied upon the interest of a partner "in the firm property, and it may be sold for payment "of the judgment. But the purchaser only acquires "the interest of the debtor subject to the settlement of "the debts and liabilities of the firm. It can only hold "such interest as a partner has on a final settlement "and account of the affairs of the firm, and the rights "of the partners on such accounting."

Rainey vs. Nance, 54 Ill. 27, 36-37.

"Each partner has a lien on the funds for his share "of the surplus, as well as for his indemnity against "the joint debts."

Matlock vs. Matlock, 5 Ind. 403, 404.

Black vs. Bush, 7 B. Mon., 210.

Buffum vs. Seaver, 16 N. H., 160.

Betts vs. Letcher, 1. S. Dak. 182.

Boyce vs. Coster, 4 Stroble Eq., 25.

Boyer vs. Elliott, 7 Humph., 204.

"A partner has a lien upon all the property of the "partnership for the balance due him on a final settle- "ment between the partners. The basis of this lien is "an implied trust or pledge."

Wright vs. Wright, 59 How. Pr. 176, 186.

"A partner in a dissolved firm has a lien on part- "nership realty for the amount due him on general "settlement of the partnership account, superior to "the execution lien of a post-dissolution creditor of "another member of the firm, though it had been dis- "solved for five years, and the title stood in the names "of the individual members of the firm."

Lane vs. Jones, 9 Lea 627.

"Each member of the firm has a lien upon the part- "nership property for the debts due the creditors of the "concern, and for moneys advanced by him for its use, "which he may enforce in equity even if there has been "no agreement among the partners that such lien shall "exist."

Duryea vs. Hiram Burt, et al., 28 Cal. 569.

Dillworth vs. Mayfield, 36 Miss. 40.

Ives vs. Miller, 19 Barb. 200.

"Each partner has a specified lien upon the partner- "ship stock, not only for the amount of his share, but "for moneys advanced by him beyond that amount, for "the use of the partnership."

Pierce vs. Wilson, 2 Ia. 20.

Evans vs. Hawley, 35 Ia. 83.

"In law partnership real estate is held by the part- "ners as tenants in common, but in equity is dealt with "as partnership property."

Peck vs. Fisher, 7 Cush. 387.

Lowe vs. Alexander, 15 Cal. 296.

"And, in the view of equity, it is immaterial in "whose name the legal title of the property stands— "whether in the individual name of one copartner, or

"in the joint names of all; it is first subject to the pay-
"ment of partnership debts, and is then to be distrib-
"uted among the copartners according to their respec-
"tive rights. The possessor of the legal title in such
"case holds the estate in trust, for the purpose of the
"copartnership."

Dupuy vs. Leavenworth, 17 Cal. 262, 268.

Dyer vs. Clark (5 Met. 662) and *Dupuy vs. Leavenworth* (17 Cal. 262) are cited and approved by the Supreme Court of the United States in a case in which the Court, in speaking of the interest of a partner in the firm real estate, says:

"It is an equitable right accompanied by an equit-
"able title. It is an interest in the property which
"courts of chancery will recognize and support. What
"is that right? Not only that the court will, when
"necessary, see that the real estate so situated is ap-
"priated to the satisfaction of the partnership debts,
"but that for that purpose and to that extent, it shall
"be treated as personal property of the partnership,
"and like other personal property pass under the con-
"trol of the surviving partner. This control extends to
"the right to sell it, or so much of it as may be neces-
"sary to pay the partnership debts, or to satisfy the
"just claims of the surviving partner."

Shanks vs. Klein, 104, U. S. 18, 22.

"When one of two partners purchases real estate
"with partnership funds, but takes title in his own
"name, and takes possession, his possession is the pos-
"session of both, and a trust results in favor of his
"partner."

Riddle vs. Whitehill, 135, U. S. 621.

Joint purchasers of land, where one party pays more than his share, stand in respect to the equity between them as partners, and the party paying the excess has the right to be reimbursed out of the land, and also to have debts paid for money jointly borrowed to pay on the land, before the other party *or his attaching creditor* can have any part of the proceeds.

Furman vs. McMillian, 2 Lea 121.

"But the claims of the creditors of the firm and
"of the other copartners, are only in the nature of an
"equitable lien on the partnership property, for the se-

"curity, in the one case of the demands of the credi-
"tors, and in the other, of the remaining copartners,
"for any balance found to be due to them on a settle-
"ment of the partnership affairs. This lien can only
"be asserted in a Court of equity, which has the ade-
"quate machinery for winding up the partnership,
"marshaling the assets and ascertaining the debts due
"from the firm, and the balances, if any, due to the
"several copartners."

Stokes vs. Stevens, 40 Cal. 391, 394.

The right of the appellee to have his advances paid out of the property in question is therefore as held in Shanks vs. Klein (supra) "An equitable right accompanied by an equitable title.

"It is an interest in the property which Courts of
"Chancery will recognize and support."

The cases above cited conclusively demonstrate that the appellee had a lien upon the premises in question which attached on March 20, 1897, the date of the purchase of the premises by the appellee and Rainey.

Second.

The Court did not err in holding Smith's alleged partner's lien to be a lien on Rainey's one-third interest in the premises in controversy, and in holding such lien to be superior to the Luke's attachment lien thereon.

As we have hereinbefore shown, the plaintiff acquired a lien upon the premises in question which attached on March 20th, 1897, the date of the purchase of the premises by the appellee and Rainey. The appellant's lien did not attach until June 11th, 1902, the date of the levy of the appellant's writ of attachment upon said premises. (Printed Record, pages 51-52.) The lien of the appellee is therefore prior to that of the appellants, unless the appellee has lost his rights either by virtue of some express statute, or by some act which estops him from asserting the priority of his claim as against appellee.

We understand counsel for the appellants to claim that the appellant's lien is prior to appellee's title

First: Because of the Recording Act of Arizona, Rev. Stats. 1901. *Par.* 749, *and the failure of appellee to record his partnership agreement.*

Second: Because, as appellant claims, appellee with notice and without protest permitted Rainey to mortgage the property, and otherwise publicly treat it as his own undivided property.

The interest of appellee in the premises in question is not such an interest as is governed by the registration act of the Territory of Arizona. That act provides:

> "All bargains, sales and other conveyances whatever of any lands, tenements and hereditaments, whether they may be made for passing any estate of freehold or inheritance or for a term of years; and deeds of settlement upon marriage, whether land, money or other personal thing, and all deeds of trust and mortgages whatsoever, which shall hereafter be made and executed, shall be void as to all creditors and subsequent purchasers for valuable consideration without notice, unless they shall be acknowledged and filed with the recorder, to be recorded as required by law, or when record is not required deposited and filed with the recorder; but the same as between the parties and their heirs, and as to all subsequent purchasers, with notice thereof, or without valuable consideration, shall nevertheless be valid and binding."

This act is taken verbatim from the statutes of the state of Texas. Having been adopted from that state, the legislature is presumed to have adopted with it the interpretation of it as given by the Supreme Court of that state.

Gold vs. Sotelo, 8 Arizona, 85, 92.

This registration act has been repeatedly construed by the Supreme Court of the state of Texas and has always been held not to apply to a mere equitable interest. In a case decided by that Court in 1862, the Court used the following language:

> "It seems to be well settled that a judgment lien on the land of a debtor is subject to every equity which existed against the land in the hands of the judgment debtor at the time of the rendition of the judgment. And Courts of equity, it is said, will protect the equitable rights of third persons against the legal lien, and will limit that lien to the acual interest which the judgment debtor has in the estate. (4th Paige's Chancery Rep., pages 14 and 15, and cases cited.) This doctrine is qualified by the registration laws of particular states, prescribing the effect of unrecorded conveyances and mortgages upon the rights of purchasers and creditors. And although, in the present instance the lien of the judgment recorded by Mullins would prevail over the un-

"registered deed executed by J. J. Blankenship to "David Blankenship, on the 7th of November, 1856, un- "less it were shown that Mullins had 'actual notice or "reasonable information' of said deed, this is so only "by virtue of our statute of the 5th of February, A. D. "1841. If the property in controversy was purchased "by John J. Blankenship with the funds of David "Blankenship, and for him, then the equitable estate "in the land was in David Blankenship, and upon proof "of the facts, the land might have been sold under exe- "cution for the debts of David Blankenship, and the "purchaser could have maintained his action against "John J. Blankenship to compel a conveyance of the "legal title. This kind of an equity is beyond the con- "templation of our statute of registration respecting "the rights of creditors. It is true that a purchaser of "the estate, under these circumstances, from John J. "Blankenship, in good faith, that is to say, without "notice, and for a valuable consideration, would take "the estate discharged of the equity of David Blanken- "ship. But it is settled that one who acquires a judg- "ment lien, although without notice, is not to be re- "garded in the light of a purchaser and entitled to a "preference over prior equities."

Blankenship vs. Douglas, 26 Tex., 225-228, 229.

The doctrine of this case has been, as we shall show, adhered to in Texas by an unbroken line of decisions.

"The judgment lien upon which the sheriff sold the "land was no better than the title by which the judg- "ment debtor held it; and a purchaser at such judicial "sales takes the land subject to all the equities which "are against it, and can derive no better title than that "which was held by the judgment debtor. That is all "the sheriff can sell or the vendee buy. But A. C. "Whatley had only the legal title in trust for his father "and sister, and the purchaser at sheriff's sale took "nothing. * * * *

"A resulting trust is protected against the opera- "tion of the registration laws."

Oberthier vs. Stroud, 33 Tex. 522-524.

"In the year 1856, the plaintiff and defendant be- "ing man and wife, the defendant made and delivered "to his wife his promissory note for the sum of $1,800, "to secure the payment of which, he, at the same time,

"executed a mortgage upon four hundred and fifty "acres of land, situated in the county of Fayette. The "mortgage was not recorded until the first Tuesday of "October, 1868, on which day the lands described in "the mortgage were sold upon execution, to satisfy a "judgment rendered at the November term, 1865, in "favor of one J. H. Gay against L. F. Price, the appel- "lee. The mortgage was recorded before the hour of "sale, and the appellant gave personal notice to Cole, "the purchaser, of the existence, record and nature of "her mortgage." Held Cole not an innocent purchaser without notice.

Price vs. Cole, 35 Tex. 461-470, 471.

"If, as claimed, the land conveyed by Avery to P. "R. Trial and wife was in part paid for with trust "funds held by Trial for the appellees, and to that ex- "tent he purchased the land for them, that would vest "in the appellees an equitable right as would sustain "an action by them against Trial to compel a convey- "ance of the legal title.

"An equitable right of this character is not within "the operation of the statutes of registration, as re- "spects the rights of creditors. That is, if the creditor "of the party holding the legal title should attempt to "subject the land to the payment of his debt, the rule "applied in Grace vs. Wade, 45 Tex. 522; Grimes vs. "Hobson, 46 Tex. 416, and other like cases, to the effect "that an unrecorded deed is void against a creditor who "has acquired a lien upon the land without notice, has "no application.

"As a general proposition, a judgment lien only "attaches to the actual interest of the debtor in the "land; but on account of our registration laws, ordi- "narily, if the judgment lien attaches before the cred- "itor has notice of the existence of the unrecorded "deed, then such deed is subordinated to the lien, and "subsequent notice of the existence of the deed would "work no change in the rights of the parties. But when "the debtor holds the legal title in trust for others, "with whose funds and for whose use it was purchased, "then if the purchaser at sheriff's sale, made by virtue "of such judgment, has notice of the rights of the "*cestui que trusts* before his purchase, he would ac- "quire no title to the property as against them. *This* "*distinction results from the fact that such an equit-*

"able right is not subject to or governed by the registra-
"tion statutes."

Calvert vs. Roche, 59 Tex. 463-464, 465.

"That resulting trusts are not subject to the regis-
"tration laws is not an open question in this state."

Parker vs. Coop, 60 Tex. 111-116.

"In Grace vs. Wade, 45 Tex. 528; Borden vs. Mc-
"Rae, 46 Tex. 396; Ayers vs. Duprey, 27 Tex. 596;
"Wallace vs. Campbell, 54 Tex. 90, and perhaps in some
"other cases that have escaped our observation, it has
"been held that, by force of our registration laws, a
"lien acquired by a judgment or the levy of an execu-
"tion on the real estate of the debtor is superior to
"the legal title which had been, previous to the date
"of the lien, conveyed by him by deed to a third party,
"but which deed had not been recorded, and of which
"the creditor, at the date his lien was fixed, did not
"have actual notice; and further, that this superiority
"was not affected by the fact that actual notice of the
"unrecorded deed may have been given at or before the
"day of sale. * * * * *

"The lien, however, it must always be borne in
"mind, in considering these cases and all cases of a like
"character, prevails over the unrecorded deed, *alone*
"by force of and by virtue of the registration laws.

"These decisions only apply to cases where the
"third party to be affected by the unrecorded convey-
"ance acquired thereby the *legal title;* or where his
"right or interest is represented by some written in-
"strument, that is required or permitted by law to be
"recorded, and which he has neglected to record, and
"of which the judgment creditor had no actual *notice*
"at the date of the acquisition of his lien.

"This court has never held that the doctrines above
"announced applied to cases where the rights of a
"third party, as in this case, for example, claiming
"through or under the judgment creditor, were purely
"equitable in their character, and which were not in
"their nature susceptible of registration, when actual
"notice of such equitable title was brought home to the
"purchaser before the sale and purchase."

Santer & Co. vs. Lambeth, et al., 59 Tex. 259-262,
263.

"This doctrine (that of Grace vs. Wade) is only
"applicable to such judgment liens and others recog-

"nized as subsisting liens in law. It would be a most "dangerous doctrine if extended and applied to *quasi* "judgment and *quasi* charges upon land. That doc- "trine should not be extended to other than the cases "embraced in the original rule."

Bradley vs. Love, 60 Tex. 372-378.

The appellants are not subsequent purchasers for a valuable consideration. So far as they are purchasers, they are purchasers without valuable consideration; hence, they are not within the protection of paragraph 749.

"It is the well settled law of this court that an exe- "cution lien will hold good as against an unrecorded "conveyance previously made to a third party by the "judgment creditor. Ayers vs. Duprey, 27 Tex. 594; "Grace vs. Wade, 45 Tex. 522; Borden vs. McRae, 46 "Tex. 396; Parker vs. Coop, 60 Tex. 111; Grimms vs. "Hobson, 46 Tex. 416. Hence, where such a lien has "been secured without notice, the purchaser at the sale "made under the execution is protected in his title, "whether he have knowledge of the unrecorded instru- "ment at the time of his purchase or not. * * *

"But as a resulting trust is not within the regis- "tration laws, and the holder of this equity cannot "spread his title upon record, these rules are inappli- "cable to this case. Parker vs. Coop, 60 Tex. 111. "Hence a creditor claiming a mere statutory lien by "judgment or execution has been held by this court "not to be protected by reason simply of want of notice "of such an equity. * * * *

"Hence, also an execution or judgment lien, ob- "tained without notice of the resulting trust, cannot "inure to the benefit of one buying at the sheriff's sale "made under the execution.

"The title of the latter as against the resulting trust "must be determined without reference to any notice "of it at the time of the record of the judgment or the "levy of the execution. It must depend upon whether "or not he had notice at the time of sale, and if not, "then whether or not he was a purchaser for valuable "consideration.

"As Thompson bought the property in controversy "without notice of Mrs. McKamey's title, the only ques- "tion for our decision is: Was he a purchaser for val- "uable consideration, having paid the amount of his "bid by crediting it upon his judgment against the "defendant in execution?"

After a full review of the authorities the court holds that such a purchaser is not a purchaser for a valuable consideration and consequently is not entitled to the protection of the recording act whether he has notice of the prior lien or not.

McKamey vs. Thorp, 61 Tex. 648-651, 652.

"Resulting trusts are not affected by the laws reg-"ulating registration, but it has been constantly held "that a purchaser from the apparent holder of the legal "title, who buys and *pays for* the property without "notice of the equitable right, will be protected against "it."

Allday vs. Whitaker, 66 Tex. 669, 673.

The same court has held that a purchaser of land at sheriff's sale, who bought for the purpose of securing a pre-existing judgment in his own favor, and who paid for the land by a credit of his bid upon the judgment, is not a *bona fide* purchaser for value, in legal contemplation, and takes subject to an unrecorded vendor's lien whether he had notice of it or not.

Orme vs. Roberts, 38 Tex. 768.

"The statute protecting creditors against prior un-"recorded conveyance cannot mean to place a judgment "creditor in any better position when he obtains his "judgment than he is in after the land has been sold "and he buys it on his judgment. Such an interpreta-"tion of the law would have no foundation in reason "or justice to stand on."

Farley vs. McAlister, 39 Tex. 602-603, 604.

A purchaser at an execution sale, who pays the amount of his bid by crediting the judgment foreclosing a mortgage which is owned by his ward, is not a purchaser for value.

Delespine vs. Campbell, 52 Tex. 4.

"The appellant as a purchaser at execution sale, "crediting the amount of its bid on its judgment, is not "to be deemed a purchaser for value."

Aultman Miller & Co. vs. George, 12 Tex. Civ App. 457-459.

A creditor who purchases land at an execution sale, under his judgment, and merely credits the amount

of his bid on the judgment, is not a bona fide purchaser for value as against the rights of third persons.

Cobb & Avery vs. Trammell, 9 Tex. Civ. App. 597.

Plaintiff not being a purchaser for valuable consideration at his own execution sale of the land, it was immaterial whether or not he had notice at that time of the resulting trust in the land then existing in favor of the defendant children.

Hicks vs. Pogue, 33 Tex. Civ. App. 333.

The foregoing cases, we think, clearly demonstrate the doctrine that under the registration statute of Texas, which was adopted by the Territory of Arizona with the construction placed upon it by the courts of Texas, a purely equitable interest such as that of the appellee in the case at bar, is not within the protection of the act. As to such an interest the law of Arizona is the same as that of almost every state in the union, namely:

"The rights of an attaching creditor to property at-
"tached must be determined by the state of the title
"at the time the attachment was made, and in the ab-
"sence of fraud he only obtains the rights which the
"debtor had in the property at that time."

(4 Cyc. 632, 76—Cases cited.)

The appellants cannot claim the protection of the statute as creditors, nor can they claim its protection as purchasers for a valuable consideration without notice, because they are not purchasers for a valuable consideration. It would seem therefore to be immaterial whether or not at the time of their purchase they had actual or constructive notice of the appellee's claim. The Supreme Court of Arizona, however, found, and we think rightly, that: "The Lukes were put upon inquiry and by dili-

"gence could have ascertained before the sale the rights
"of Smith in the premises. The complaint advised
"them that Smith and Rainey had a contract in writ-
"ing which Smith claimed gave him a lien upon the
"land." (Transcript of Record, page 36.)

We now come to the consideration of the third Assignment of Error.

Third.

The court did not err in holding that the appellants had notice of Smith's partner's lien prior to their purchase of the premises in controversy at the sheriff's sale, and that

such notice rendered such purchase subject to such alleged partner's lien.

The rule is elementary that where a party has sufficient notice to put him upon inquiry and he neglects to make such inquiry, he is chargeable with knowledge of all facts, to which that inquiry would have led. In the case at bar the appellants were apprized, at the commencement of this action, by the original complaint filed therein, that Smith claimed a lien upon Rainey's interest in this land; that he claimed this lien by virtue of a written contract between himself and Rainey, and that he claimed that his lien was prior to that of the appellants. The appellants now insist that the lien was designated in the original complaint as an equitable mortgage, whereas, in fact, it was the lien of a partner upon the partnership assets; that the provisions of the agreement set forth in the original complaint did not disclose the existence of a partnership, and that they were not apprized of the true nature of the lien until the filing of the last amended complaint, which was some time after they had purchased at the sheriff's sale on their own execution. On page 26 of appellants' brief we find a quotation from Converse vs. Blumrich, 14 Mich. 108-120. That case was an action to foreclose a mortgage; it was defended on the ground that the plaintiff had procured its execution by false and fraudulent misrepresentation; it was claimed that defendant was chargeable with constructive notice of the facts claimed to have been misrepresented, because having the means of knowledge he failed to make use of them. The facts were peculiarly within plaintiff's knowledge. In procuring the mortgage, the foreclosure of which was sought, he denied their existence. It was with reference to this state of facts that the court used the language quoted on pages 26 and 27 of appellants' brief.

The case of Dickey vs. Henarie, cited on page 27 of appellants' brief, manifestly fails to sustain the appellants' position in the case at bar. There, a tenant in possession, gave notice at the sheriff's sale that he had a sub-lease on a cigar store; he did not give notice that this lease gave him the exclusive right to sell tobacco and cigars in the whole of the building. The court held that the purchaser was not chargeable with notice of this provision of the lease. In the case at bar the original complaint expressly informed the appellants that the appellee claimed a lien upon Rainey's interest in the premises in question and that it was prior to appellants' lien. If they did not so construe the writteen instrument, or so much of it as was set forth in the complaint, it was their duty to ask for a copy of it in order that they might be fully advised of its legal significance. This they failed to do.

The cases cited by the learned Supreme Court of Arizona, in its opinion in the case at bar (Transcript of Record, pages 35 and 36), amply sustain the conclusion of that Court, that in the case at bar, the appellants had constructive notice of appellee's claim at the time they purchased Rainey's interest in the premises in question, at their own sheriff's sale.

In the case of Vredenburgh vs. Burnet, 31 N. J. Equity, 229, the Court, in discussing the question of sufficiency of notice of an arrangement, whereby two mortgages appearing on the record as concurrent liens, were made one subordinate to the other, said, on page 233:

> "He (defendant) admits notice of the arrangement; "he complains simply because he did not know that it "was understood that the complainant's mortgage "should be the first lien on the vacant lot as well as "the other. NOTICE OF ANY PART OF THE AR- "RANGEMENT WAS SUFFICIENT, IN MY "JUDGMENT, TO PUT UPON HIM THE DUTY OF "SEEKING FULL INFORMATION OF THE HOLD- "ER OF THE OTHER MORTGAGE, AND IF HE "FAILED TO PERFORM IT AND LOSS ENSUED, "HE MUST BEAR IT AS THE CONSEQUENCE OF "HIS OWN FAULT. Whatever puts a party upon in- "quiry, amounts, in judgment of law, to notice, pro- "vided the inquiry became a duty, as in the case of pur- "chasers and creditors, and would lead to the knowl- "edge of the requisite fact by the exercise of ordinary "diligence and understanding."

It must be very evident to this Court that the appellants had sufficient notice to put them on inquiry as to the claims of the appellee. The fact that they proceeded to sell the property under their judgment and purchase it for themselves in their own name, without making the necessary inquiry as to the contents of the contract and agreement referred to in the pleadings upon which appellee based his claim to a prior lien, is sufficient to place them in the position of purchasers with full knowledge of all of the facts surrounding Smith's claim, and therefore places them without the category of "Innocent Purchasers." We insist that there can be no doubt that the Supreme Court of Arizona was right in holding that the appellants had notice of the appellee's partner's lien prior to their purchase of the premises at the sheriff's sale, and that such notice rendered such purchase subject to such partner's lien.

Fourth.

The Court did not err in holding that paragraph 2703, Rev. Stat. Ariz 1901, is not applicable to the facts in this case.

That section provides that: "If any person shall do or trans-

> "act business as a merchant or trader, with the addi-
> "tion of the words agent, factor or company, or and Co.,
> "or words of like significance or import, and shall fail
> "to disclose the name of his principal or partner or
> "other person who may be interested in such business
> "by a sign in letters easy to be read, placed conspicuous-
> "ly at the place where such business is transacter; or if
> "any person shall transact business in his own name,
> "without any such addition, all the property, stock,
> "money and choses in action, used or acquired in such
> "business, except such property as may be exempt from
> "execution, shall, as to the creditors of any such per-
> "son, be liable for his debts, and be, in all respects,
> "treated in favor of his creditors as his property;
> *"Provided,* That this title shall not apply to copart-
> ners who have complied with the provisions of title
> "51 of the revised Statutes of Arizona."

There is no finding in the case at bar that either Rainey or the appellee did any business whatever in Arizona as a merchant or trader with the addition of the word agent, factor, or company, or and Co., or words of like significance or import, or that Rainey failed to disclose the name of his principal, or partner, or other person who might be interested in such business. There is no finding that either Rainey or appellee ever had any place of business in Arizona, or that they ever transacted any business there, other than the joint purchase of the particular parcel of land in question. The purchase of that tract of land was certainly not doing business as a merchant or trader. We fail to understand how counsel can seriously contend that this statute is applicable to the case at bar.

Appellants' counsel on page 20 of appellants' brief says:

> "It seems to us that this statute is conclusive of this
> "case, and that the Lukes as creditors of Rainey are
> "directly within its letter and spirit."

We are informed on pages 20 and 21 of appellants' brief, that this section was adopted from the statutes of Mississippi, and that it must be held to have been adopted with the construction placed upon it by the courts of that state. And that such

is the law we do not dispute. The appellants' counsel have cited two Mississippi cases holding that the object of the statute was to prevent the assertion of secret claims to property as against creditors of the person who seems to be the owner of it. Also to a case holding that where a party transacted business in his own name, displaying no sign indicating that another had any interest in the business; that the property in question was used and acquired in that business, it is liable for the debts created by the person so transacting the business. There is no finding in the case at bar that Rainey or appellee ever had a place of business in Arizona; that he ever displayed any sign whatever in that territory, or ever incurred any liability respecting the property in question.

There is no finding or pretense in the case at bar that the appellants' judgment against Rainey was recovered upon a debt in any manner connected with the property in question.

Fifth.

The Court did not err in affirming the decree of the trial court directing the sale of Rainey's one-third interest in the property in controversy in satisfaction of the claim of Smith against the alleged partnership of Smith and Rainey.

The Fifth Assignment of Error needs no argument. If we are right in the first four propositions discussed, it follows, as a matter of course, that the court could have entered no other judgment than the judgment from which this appeal is taken.

REVIEW OF AUTHORITIES CITED BY APPELLANTS.

On page 9 of appellants' brief we find a number of cases cited in support of the proposition that, "Real property con-

> "veyed to one member of a partnership, and standing "of record in his name in which conveyance and record "the other partner participates and acquiesces, though "purchased with money advanced to the partnership "by such participating and acquiescing partner, is sub- "ject to attachment and execution by the creditors of "the partner holding such record title, who have no "notice of such partnership, and the lien of such at- "taching and execution creditors is prior and superior "to the equitable right of such consenting and acquiesc- "ing partner to have the partnership property applied "to the payment of his advances to the partnership."

The Pennsylvania cases cited in support of this proposition are the only ones which in fact sustain it, and so far as we have

been able to ascertain by diligent search, the Supreme Court of Pennsylvania is the only court in the United States which has laid down the law as cited in the appellants' brief. The doctrine is diametrically opposed to that laid down by this court in the case of *Shanks vs. Klein*, 104 U. S. 18.

Blake vs. Nutter, 19 Me. 16. This case merely holds that:

> Real estate purchased with partnership funds for partnership purposes, and so used and enjoyed, is held by the members of the firm as co-tenants—and the superior right of the partnership creditors over the creditors of the individual partners does not apply *at common law* to real estate thus purchased.
>
> Whether a different rule in equity should be adopted—quaere.

In a more recent case the same court held that,

> Where the creditors of one of the members of a copartnership had instituted suits at law against him, and attached his *legal* interest in real estate thus conveyed, intending to levy thereon to satisfy their judgments, when rendered, the Court, in the exercise of its chancery powers, will interpose to protect the rights of the other partners, when the estate attached will be required to pay the debts of the firm (including the firm's liabilities to its individual members), and, if without it, the partnership will be insolvent.
>
> *Crooker vs. Crooker*, 46 Me. 250.

Hammond vs. Paxton, 58 Mich. 393. (Erroneously cited in appellants' brief as Hammond vs. Palton.) In this case a bill

> was filed on March 24, '73, together with a notice of lis pendens, to have certain land adjudged partnership property and subjected to the payment of partnership indebtedness, April 9, 1873, an order was entered by defendants' solicitor, dismissing the bill for want of prosecution. On April 15, 1873, the defendants gave the note and mortgage in suit. On April 18, 1873, another bill was filed containing the same charges as were contained in the bill which had been dismissed and judgment was subsequently entered, declaring the land in question partnership assets. It was claimed that the mortgagee in the mortgage of April 15th was bound by the notice of lis pendens filed in the suit which was dismissed. The Court held that he was not so bound, because, although the decree dismissing the

bill of complaint in the first action was irregularly entered, nevertheless in order to affect a purchaser or encumbrancer with constructive notice the suit must be prosecuted with reasonable diligence, and a neglect to do so will relieve a purchaser without actual notice from the effect of this lis pendens, if the suit be abandoned, or no decree be entered therein, the purchaser is not affected by the filing of the notice.

Forde vs. Herron, 4 Munf. 316. This was a case where a partner, being the holder of the *legal title* to an undivided one-half of certain real estate conveyed his moiety to secure his individual debt to one having no notice that it was in fact partnership property. The conveyance was duly recorded. The Court held that his grantee took title free from the claim of the other partner.

Buchan vs. Sumner, 2 Barb. Ch. 165. (Erroneously cited by appellants' counsel as Buchan vs. Tumver, 2 Barb. 165.) In that case the court uses the following language, pp 206-207:

"Although a court of equity considers and treats "real property as a part of the stock of the firm, it "leaves the legal title undisturbed, except so far as is "necessary to protect the equitable rights of the several "members of the firm therein. And in the present case, "Sumner was the owner of the one-half of the mort-"gaged premises, subject to the equitable lien of his "co-partner thereon, for one-half of the debts which "the latter was obliged to pay, subsequent to the disso-"lution of the firm; the personal property of the co-"partnership having been disposed of at the time of "such dissolution. That prior equitable lien, how-"ever was paramount to the subsequent legal lien of "the appellant, by virtue of his judgment. For the "separate creditors of the individual partners have no "equitable right, to any part of the partnership prop-"erty, until the debts of the firm are provided for, and "the rights of the partners as between themselves fully "protected." * * * *

"The lien which the appellant, in this case, had "obtained, upon the legal title of his judgment debtor, "in one-half of the equity of redemption in the mort-"gaged premises, by the prior docketing of his judg-"ment, must therefore yield to the superior as well "as prior equitable claim of Naylor, upon the same "equity of redemption as partnership property. For "the general lien of a judgment creditor, upon the

"lands of his debtor, is subject to all equities which "existed against such lands, in favor of third persons, "at the time of the recovery of the judgment. And the "court of chancery will so control the legal lien, of "the judgment creditor, as to restrict it to the actual "interest of the judgment debtor in the property; so "as fully to protect the rights of those who have a prior "equitable interest in such property, or in the pro- "ceeds thereof."

First Nat'l Bank vs. State Sav. Bank, 89 N. W. 941.

In this case the record title to the land in question was, as in the case at bar, in the two partners as tenants in common, although in fact partnership property. After the death of one of the partners, the surviving partner made a contract with one of the defendants to sell him the land for $600; the contract was not recorded. The defendant bank caused a levy to be made upon the land December 19, 1894. Prior to that date the surviving partner had made deeds under which complainant claimed title; these deeds were not recorded until after the defendants' levy. The Court held the levy prior to the deeds under a statute of Michigan, which provides that "the lien "thus obtained shall be valid against all prior *grant-* "*ees* and *mortgagees* of whose claims the party in- "terested shall not have actual or constructive no- "tice."

Alexander vs. Thompson, 111 N. W. 385-386. The facts in this case are as follows:

On February 13, 1888, the record title in fee of the land was in George J. Day, and so remained until June 15, 1888, when he conveyed it by warranty deed to Olaf Noren, who gave a mortgage thereon to secure a loan to the plaintiff. This mortgage was duly foreclosed, and the land sold to the plaintiff by virtue thereof. No redemption was ever made from the foreclosure sale. The deed and mortgage were duly recorded on July 3, 1888. Thereafter, the defendant brought an action in which he was plaintiff and George J. Day and others were defendants, to dissolve a partnership theretofore existing between himself and Day, and to have the deed and mortgage cancelled. The plaintiff was a purchaser for value without notice of the alleged equitable lien of Thompson.

On these facts the Supreme Court of Minnesota very properly held, that the plaintiff's title was superior to that of Thompson.

On page 9 of appellant's brief we find the proposition stated that,

> "By participating and acquiescing in the convey-
> "ance to Rainey of an undivided one-third interest in
> "the real estate which he advanced the money to pur-
> "chase, and by participating and acquiescing in plac-
> "ing such title in Rainey of record, and with notice
> "and without protest permitting Rainey to mortgage
> "the property, and otherwise publicly treat it as his
> "own individual property, the plaintiff, Smith, waived
> "all right to claim a lien upon said premises prior and
> "superior to that of the attachment and judgment
> "creditors of Rainey, who became such upon the faith
> "and credit of such record title, and without notice of
> "the fact of the existence of such partnership or the
> "making of such advances."

In support of this proposition, the appellants' counsel cites R. S. Ariz. par. 753; Ford vs. Herron, supra, and Wilhite vs. Boulware, 88 Ky. 160.

Paragraph 753, R. S. Ariz., provides that,

> "The record of any grant, deed or instrument in
> "writing authorized or required to be recorded which
> "shall have been duly acknowledged for record and
> "duly recorded in the proper county shall be taken and
> "held as notice to all persons of the existence of such
> "grant, deed or instrument."

We understand appellants' counsel to argue that paragraph 753, R. S. Ariz., above quoted, charges the appellee with constructive notice of the mortgage executed by Rainey to one Hubbard. (Transcript of Record, page 50, folio 98.)

The Supreme Court of Arizona, in its opinion in the case at bar, states:

> "There is no evidence, however, that Smith knew
> "anything of this mortgage, and we do not think that
> "the record operated as constructive notice to him."
>
> (Transcript of Record, p. 36, folio 71.)

Paragraph 753, as well as 749, was adopted from the Statute of the State of Texas, and must, of course, be deemed to have been adopted with the construction placed upon it by the courts

of that state. The Supreme Court of Texas, in construing this statute, used the following language:

> "The proposition is frequently announced that "under the registration laws the proper record of an "instrument authorized to be recorded is notice to all "the world. Although the language of Article 4652" (which is the same as Paragraph 753, R. S. Arizona) "of the revised statutes gives countenance to "the doctrine as thus broadly stated, it has been de- "cided by this court that the proposition is subject "to important qualification. For example, in Holmes "vs. Buckner, 67 Tex. 107, 2 S. W. 452, the Court quote "with approval the following language: 'The regis- "try of a deed is notice only to those who claim through "or under the grantor by whom the deed was exe- "cuted.' The doctrine was applied in the decision "of that case, and the decision has been followed in "subsequent cases. Lumpkin vs. Adams, 74 Tex. 96, "11 S. W. 1070; Jenkins vs. Adams, 71 Tex. 1, 8 S. W. "603; Frank vs. Heidenheimer, 84 Tex. 642, 19 S. W. "855. So, also, it is held in other jurisdictions that "the record of a deed or mortgage is notice to sub- "sequent purchasers from the same grantor, but not "to prior purchasers. Doolittle vs. Cook, 75 Ill. 354; "Stuyvesant vs. Hall, 2 Barb. Ch. 151. In the case "last cited the Court says: "The whole subject of "the recording acts is to protect subsequent purchas- "ers and incumbrancers against previous deeds, mort- "gages, etc., which are not recorded; and to deprive "the holder of the prior unregistered conveyance or "mortgage of the right which his priority would have "given him at the common law. The recording of a "deed or mortgage, therefore, is constructive notice "only to those who have subsequently acquired some "interest or right in the property under the grantor "or mortgagor." The decisions of our Court above "cited establish a rule of property, and we need not "stop to inquire whether they are correct or not."

White vs. McGregor, 50 S. W. 564-565.

That this is the general doctrine is established by the following cases:

Garrett vs. Simpson, 115 Illinois, App. 62.
Bates vs. Norcross, 14 Pickering, 224.
Leach vs. Beatties, 33 Vermont, 195.

Maul vs. Rider, 59 Pa. St. 167.
Chowan vs. Phelps, 26 Mont. 524.
Building Association vs. Fellers, 96 Va. 337.

In the case last cited, the Court used the following language:

> "It is true, we think, as stated by counsel, that "this Court has never passed upon that question, but "it is well settled, both upon principle and authority, "that the registry of a deed by a subsequent pur- "chaser is no notice to parties who have acquired "their rights before the time when the deed is reg- "istered. Neither the language nor the policy of the "registry acts was intended to affect the holder of "antecedent rights, but only such persons as are com- "pelled to search the record in order to protect their "own interests."

It is therefore clear that the record of a mortgage executed by Rainey subsequent to the acquisition of the title to the premises in question by Smith and Rainey is not constructive notice to the appellee that Rainey was dealing with his interest in this property as though it were his individual property. There is no pretense that appellee had actual notice of the existence of such mortgage.

> *Wilhite vs. Boulware*, 88 Ky. 169. This case expressly recognizes the equitable lien of a partner upon the partnership property, but holds that the real estate in question was *not* such property.

On page 9 of appellants' brief, we find the proposition announced that:

> "Even when a partner is entitled to a lien, he may "waive it, or by his conduct lose its benefit."
> 30 Cyc. 701.

It is doubtless true that a partner, like any one else may waive any right which he may have. We submit, however, that there are no facts in the case at bar tending to show that the appellee, in the case at bar, ever did waive any such right.

The cases cited in Note 28, 30 Cyc. 701, clearly indicate the conduct which will amount to such a waiver.

> *Robertson vs. Baker*, 11 Fla. 192. Lien lost by partitioning the property between the partners, the

creditor partner taking a mortgage on the assets which were turned over to the debtor partner.

Kemmerer vs. Kemmerer, 85 Iowa, 193. Lien lost by the creditor partner's sale of his interest in the firm and of his judgment against the debtor partner.

Wishek vs. Hammond, 10 N. D. 72. Lien lost by assenting to a division of the assets between the partners.

The Court will readily see that in the case at bar the appellee has done nothing which can possibly be construed as a waiver of any rights which he may have had in the property in question.

The cases as cited on page 10 of appellants' brief all relate to the priority of the lien of a judgment over that of unrecorded deeds or mortgages, which instruments are clearly within the protection of paragraph 749, R. S. Arizona.

On pages 10 and 11 of appellants' brief, we find the statement that:

> "The Supreme Court of Texas stands alone in its "opinion that secret equities are not within the pro- "tection afforded to judgment creditors by the re- "cording acts."

That this is not true we have already shown; if true, however, the decisions of that Court must control the decision of the case at bar.

On page 11 of appellants' brief, we find the statement that:

> "The Federal Courts made no distinction between "secret equities and unrecorded deeds regarding the "time of notice of their existence as affecting pur- "chasers at execution sales."

The authorities cited by appellants' counsel in support of this proposition wholly fail to sustain it. To review these cases in detail would extend this brief to unnecessary length.

On page 29 of appellants' brief, counsel urges the proposition that:

> "The trust must result, if at all, at the instant the "deed is taken, and the legal title vests in the "grantee."

And counsel argues that, in the case at bar, no trust resulted for the benefit of the partnership, because the agreement upon which the appellee bases his cause of action was not actually executed until a month after the deed conveying the legal title to the premises in question to the appellee and Rainey.

The agreement itself will be found on pages 7, 8 and 9, Transcript of Record; it bears date the 20th day of March, 1897, the same date borne by the deed conveying the legal title to the premises to the appellee and Rainey; it recites in detail the terms and conditions upon which the purchase was made. So far as the appellants are concerned, it is immaterial whether the agreement was ever reduced to writing. That it was in effect from the moment the title was conveyed to the appellee and Rainey there can be no doubt, from the facts disclosed by the record in this case.

On page 19 of appellants' brief, we find the statement that:

> "Appellee, without protest, permitted Rainey to "treat the title thus conveyed to him as his own, by "executing and recording a mortgage thereon to A. "G. Hubbard for $3,000, in which mortgage Rainey "declared himself to be the exclusive owner of said "undivided one-third interest, with good right and "lawful authority to convey and mortgage the same, "with full covenants of warranty. He permitted the "title so conveyed to Rainey to so remain of record "that upon the faith and credit thereof the Lukes so " dealt with Rainey that he became indebted to them, "and with the contract in writing constituting him-"self a partner with said Rainey in respect to said "premises in his exclusive possession capable of being "recorded, he kept it off the record and concealed "until the rights of the appellant had become fixed "and their lien perfected by attachment and judg-"ment."

We submit to the court that this statement is wholly without foundation in the record. There is no finding, nor was there any proof, that appellee ever knew of the execution of the mortgage by Rainey to Hubbard, by which Rainey conveyed his one-third interest to Hubbard to secure a loan for $3,000. It needs no argument to demonstrate that appellee is in no way responsible for any covenants made by Rainey in that mortgage.

There is no finding, nor was there any proof, that the appellants dealt with Rainey upon the faith and credit of his ownership of this property; nor is there any finding, nor was there any proof, that at the time the indebtedness from Rainey to the appellants was incurred, the appellants even knew that Rainey had any interest in the property in question.

Nor is there any finding or proof, that the appellee knew of the indebtedness of Rainey to the appellants until the commencement of the present action.

Should this court reverse the judgment in the case at bar, it would result in giving to appellants for the paltry sum of $2,500 property for which their judgment debtor paid nothing and which cost the appellee, up to the time that the judgment was entered in the Court below, over $28,000. Appellants' counsel seems to take the view that it is the duty of a *court of equity* to accomplish the result above indicated. We do not believe that a court of equity ought to or will permit such an iniquitous judgment.

We submit that the judgment of the Supreme Court of Arizona must be affirmed.

LEWIS M. OGDEN,
Counsel for Appellee.